

FEDERAL MARITIME COMMISSION

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DOCKET NO. 87-4

CALIFORNIA SHIPPING LINE, INC.

v.

KOREA SHIPPING CORPORATION

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ORDER OF REMAND

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The Commission determined to review the decision of Chief Administrative Law Judge Charles E. Morgan ("Presiding Officer"), served November 24, 1987, approving a Settlement Agreement between California Shipping Line, Inc. and Korea Shipping Corporation, and granting a Joint Motion to Dismiss Complaint with Prejudice. Upon review, the Commission is remanding the matter to the Presiding Officer for further action.

BACKGROUND

California Shipping Line, Inc. ("CSL") filed a complaint against Korea Shipping Corporation ("KSC"), alleging that KSC violated section 8(c) of the Shipping Act of 1984 ("1984 Act"), 46 U.S.C. app. § 1707, by refusing to provide CSL with the essential terms of KSC service contract No. ET-87-48.<sup>1</sup> Subsequently, KSC and CSL entered into a

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<sup>1</sup> In its complaint, CSL also alleged that KSC violated section 10(b)(12) of the 1984 Act, 46 U.S.C. app. § 1709, by subjecting CSL to an unreasonable refusal to deal or any undue or unreasonable prejudice or disadvantage.

Settlement Agreement by which CSL agreed to withdraw its complaint against KSC, and KSC agreed to provide CSL with a service contract with the essential terms of No. ET-86-83, instead of No. ET-87-48. The parties then filed a Joint Motion to Dismiss with Prejudice ("Motion to Dismiss"). In the Motion to Dismiss, the parties requested that the Presiding Officer specifically approve Paragraph 6 of the Settlement Agreement, and maintain the confidentiality of the settlement.<sup>2</sup>

The Presiding Officer approved the Settlement Agreement and dismissed the complaint with prejudice. In so doing, he specifically approved Paragraph 6 and held that the Settlement Agreement should remain confidential. He explained:

A careful reading of said paragraph 6, and of the regulations of the governing service contracts, as shown in the final rule in Docket No. 86-6, 46 C.F.R. Part 580 and 581, leads to the conclusion that the parties' request as to paragraph 6 may be granted.

The Presiding Officer also noted that settlements are favored by the Commission as a matter of policy. Finally, he found that the KSC-CSL settlement was substantially similar to two other settlements which also involved KSC and were approved by the Commission.

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<sup>2</sup> Paragraph 6 states:

KSC need not publish or file with the Commission essential terms or new essential terms with respect to CSL's contract, and no shipper shall have any right of access to CLS's contract, as provided by . . . 46 C.F.R. § 581.6(b)(4).

### DISCUSSION

The KSC-CSL Settlement Agreement puts at issue whether the Commission can appropriately accept a settlement which provides that: (1) a statement of the essential terms of a service contract need not be filed with the Commission; and (2) the essential terms of a service contract need not be made available to similarly situated shippers as required by the 1984 Act.

#### A. Essential Terms

Although section 8(c) of the 1984 Act requires that a statement of essential terms be filed with a service contract, KSC states that the exemption provided at 46 C.F.R. § 581.6(b)(4) is applicable here.<sup>3</sup> That rule provides that additional statements of essential terms need not be filed if the service contract is entered into as a result of a request pursuant to 46 C.F.R. § 581.6 -- i.e., if it is a "me-too" contract.<sup>4</sup> A "me-too" contract is one that is obtained by: (1) the shipper making a request with the carrier in writing for a service contract with the same

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<sup>3</sup> 46 C.F.R. § 581.6(b)(4) (1987) states that:

The service contract resulting from a request under this section may not go into effect until an executed copy is filed with the Commission under this section. No additional statement of essential terms need be filed.

(Emphasis added).

<sup>4</sup> Id.

essential terms as the initial service contract;<sup>5</sup> and (2) the carrier accepting the request by offering a service contract with the same essential terms as the initial service contract.<sup>6</sup>

In the instant case, CSL's service contract does not appear to be a section 581.6 "me-too" contract. The essential terms provided CSL as indicated in the Settlement Agreement, i.e., ET-86-83, are different than the ones originally requested, i.e., ET-87-48.<sup>7</sup> Moreover, the time within which another shipper could avail itself of ET-86-83

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<sup>5</sup> See 46 C.F.R. § 581.6(b)(1) and (2).

<sup>6</sup> See 46 C.F.R. § 581.6(b)(3).

<sup>7</sup> The instant case can be distinguished from the two cases relied upon by the Presiding Officer in his approval of the KSC-CSL Settlement Agreement, i.e., Active International Shipper's Association v. Korea Shipping Corp., Docket No. 86-23 and Freight-Savers Shipping Co., Ltd. v. Korea Shipping Corp., Docket No. 86-25. In these cases, the shippers, as part of their settlements with KSC, received the essential terms of the service contracts they initially requested.

Moreover, a section 581.6 "me-too" contract must provide the same essential terms as those provided in the initial contract -- in this case, No. ET-86-83. (See supra notes 5 and 6). However, Paragraph 6 of the Settlement Agreement, in stating that KSC need not publish or file new essential terms with respect to CSL's contract, puts into question whether the new contract will match even the essential terms of ET-86-83. The failure to file CSL's contract could, therefore, be further inconsistent with the Commission's regulations.

had expired.<sup>8</sup> Therefore, it appears that CSL's Agreement with KSC constituted a new offering which would have to be republished for the benefit of any other similarly situated shippers.

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<sup>8</sup> Under 46 C.F.R. § 580.7(g)(1)(ii)(1986), the period of availability of the essential terms of a service contract must be specified in the statement of essential terms.

46 C.F.R. § 580.7(g)(1)(ii)(1986) provides:

The essential terms of each service contract must be made available to all shippers . . . for a specified period of no less than 30 days from the date of filing of the concise statement of essential terms. (Emphasis added)

Similarly, under the newly enacted Part 581, 46 C.F.R. § 581.4(b)(1)(iv)(1987), an essential terms statement must specify the duration of the availability of the essential terms to other similarly situated shippers.

46 C.F.R. § 581.4(b)(1)(iv)(1987) provides that every statement of essential terms shall:

[c]ontain on the first page . . . the period of availability of essential terms to similarly situated shippers under § 581.6(b), i.e., both the beginning date [which shall be the date the contract is filed at the Commission] and the expiration date [which shall be no less than 30 days after the beginning date].  
(Emphasis added).

Therefore, a statement of essential terms that fails to provide a period of availability of the terms to similarly situated shippers is presumed to have a 30-day minimum availability period.

In the instant case, there is no specified period of availability of the essential terms in the statement of ET-86-83. Accordingly, ET-86-83 is presumed to have a 30-day statutory minimum period of availability, effective on April 9, 1986, and ending on May 9, 1986.

B. Availability of Essential Terms to Other Shippers

Paragraph 6 of the Settlement Agreement also suggests that KSC, on the basis of 46 C.F.R. § 581.6(b)(4),<sup>9</sup> can deny all other shippers "any right of access to CSL's contract." To the extent this language in paragraph 6 is intended to provide confidentiality to the essential terms of the contract and/or deny those terms to other qualified shippers, this appears to be inconsistent with section 8(c) of the 1984 Act and 46 C.F.R. 581.6(b)(1) of the Commission's regulations.

Section 8(c) of the 1984 Act requires that a statement of essential terms be made available to the general public in tariff format, and the terms be made available to all similarly situated shippers. Likewise, 46 C.F.R. 581.6(b)(1) of the Commission's regulations states that the essential terms of an initial contract shall be made available to all other similarly situated shippers for a period of 30 days.<sup>10</sup>

In conclusion, the service contract entered into between KSC and CSL as part of the settlement of this

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<sup>9</sup> 46 C.F.R. 581.6(b)(4), the provision cited in Paragraph 6, does not address the issue of access to a service contract.

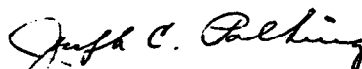
<sup>10</sup> The reference to the "right of access" to CSL's contract could be interpreted merely as an acknowledgment that the contract itself will remain confidential, rather than that its essential terms will not be made available to similarly situated shippers. Thus Paragraph 6, at a minimum, is ambiguous and, therefore, possibly unacceptable for that reason.

proceeding does not appear to be a valid section 581.6 "me-too" contract. Its terms are different from that which CSL originally sought from KSC. Moreover, the period of availability of ET-86-83 has expired. As such, it does not qualify for the exemption set forth at 46 C.F.R. § 581.6(b)(4) from filing an additional statement of essential terms. Thus, the parties' attempt to exclude their service contract from the essential terms filing requirements and to deny access of the contract to other shippers appears inconsistent with the 1984 Act and the Commission rules.

THEREFORE, IT IS ORDERED, That the Presiding Officer's decision to grant the Joint Motion to Dismiss with Prejudice is vacated; and

IT IS FURTHER ORDERED, That this proceeding is remanded to the Presiding Officer for further action consistent with this Order.

By the Commission.

  
Joseph C. Polking  
Secretary

( S E R V E D )  
( MAY 2, 1988 )  
( FEDERAL MARITIME COMMISSION )

FEDERAL MARITIME COMMISSION

WASHINGTON, D. C.

May 2, 1988

NO. 87-4

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DISMISSAL OF COMPLAINT  
WITH PREJUDICE

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On December 29, 1987, the Commission determined to review the decision of the Administrative Law Judge served November 24, 1987, which decision had approved the Settlement Agreement between the complainant, an NVOCC, and the respondent, an ocean common carrier, and their "Joint Motion to Dismiss."

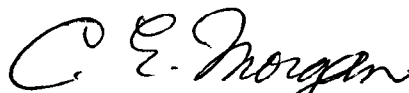
By Order of Remand served April 7, 1988, the Commission ordered the remand of the proceeding for further action consistent with the Commission's order. By procedural order served April 13, 1988, the parties were directed by the Administrative Law Judge to advise whether they wished to amend their proposed settlement agreement in any fashion.



Now, by their filing entitled "Voluntary Dismissal and Stipulation," served April 28, 1988, the parties very briefly announce that the complainant hereby withdraws its complaint with prejudice, and that both the complainant and the respondent "stipulate to complainant's withdrawal of the complaint and voluntary dismissal of this proceeding with prejudice."

Presently, the parties have not stated that they have reached any new, or amended, settlement agreement, other than the withdrawal of the complaint with prejudice. In these circumstances, hereby it is ruled that the parties, by their present stipulation, in effect also have withdrawn their original confidential "Release and Settlement" agreement attached to the parties' "Joint Motion to Dismiss" filed August 5, 1987.

Further, it is ruled that the present motion to withdraw is granted. And, the complaint hereby is dismissed with prejudice. Nevertheless, should there be any unannounced agreement or settlement between the parties, such a settlement must not contravene any law or public policy. Old Ben Coal Company v. Sea-Land Service, Inc., 21 F.M.C. 506, 512, 513.



Charles E. Morgan  
Administrative Law Judge

(S E R V E D)  
( June 7, 1988 )  
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

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NOTICE

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Notice is given that the time within which the Commission could determine to review the May 2, 1988, discontinuance of the complaint in this proceeding has expired. No such determination has been made and accordingly, the discontinuance has become administratively final.



Tony P. Kominoth  
Assistant Secretary